No. 95-740

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

UNION SECURITY LIFE INSURANCE COMPANY, *Petitioner*

v.

EVELYN CROCKER, *Respondent*

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

The Chamber of Commerce of the United States of America (hereinafter "the Chamber") respectfully submits this brief as amicus curiae in support of the petition for a writ of certiorari.[1]

INTEREST OF THE AMICUS

The Chamber, a nonprofit corporation organized and existing under the laws of the District of Columbia, is the largest federation of business, trade, and professional organizations in the United States. It represents the interests of over 215,000 corporations, partnerships, and proprietorships, as well as several thousand state and local chambers of commerce and trade and professional associations. The Chamber regularly represents the interests of its members in critical matters before the courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government.

The Chamber has a significant interest in the issue of excessive punitive damages presented in this case. In recent decades, punitive damages have become increasingly common, reaching into the millions and even hundreds of millions of dollars in individual cases. Businesses such as those represented by the Chamber are the primary target of punitive damages claims and often suffer unpredictable and arbitrary awards. As a consequence, the Chamber and its members have a strong interest in ensuring that such awards are imposed in a manner that is fair, rational, and consistent with the Constitution's guarantee of due process.

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[1] The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.2 of the Rules of this Court.

REASONS FOR GRANTING THE PETITION

This Court granted certiorari in *BMW of North America, Inc. v. Gore*, No. 94-896, to consider, among other issues, the question whether the $2 million punitive award in that case is unconstitutionally excessive. As the Court recognized in its most recent punitive damages case, although it is now well established that the Due Process Clause imposes a substantive limitation on the amount of punitive damages that may be exacted, to date the Court has not provided much guidance as to the "character of the standard that will identify unconstitutionally excessive awards." *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2335 (1994). The *BMW* case presents the Court with an opportunity to begin the process of defining the standard. But as the Chamber pointed out in its amicus brief in that case, the Court should not need to reach the excessiveness issue in *BMW* because the petitioner is entitled to a new trial as a consequence of the by-now conceded unconstitutional extraterritorial punishment that took place there.

If the Court agrees with the Chamber in *BMW* and therefore does not reach the excessiveness issue in that case, the Chamber submits that the Court should grant one of the several petitions presenting that issue that are being held in abeyance pending the Court's disposition of *BMW*. The issue of excessive punitive damages is not a quirky one; it recurs on a weekly (if not more frequent) basis. Juries continue to mulct corporate defendants at an alarming rate and in ever-increasing amounts. Reviewing courts continue to need guidance as to how to evaluate these massive exactions. The present case is a perfect example. The punitive damages in this case bear no reasonable relationship to either the plaintiff's harm, the defendant's gain, or the gravity of the defendant's misconduct. Indeed, in this case (as in many others coming out of Alabama) it is questionable indeed whether the defendant did anything wrong at all.

A. Punitive Damages Awards Have Continued Unabated Since The Court Granted The Petition For Certiorari in *BMW*.

The petition for certiorari in *BMW* contained an eye-opening list of multi-million dollar punitive exactions that had been imposed in the three months preceding the filing of the petition. That list was not aberrational. In the ten months since the Court granted the petition in *BMW*, the media have reported literally *dozens* of punitive verdicts that were equal to or greater than the one under review in *BMW*.

This parade of massive exactions includes punishments of **$400 million** against Loewen Group, **$300 million** against Durex Industries and its parent William Recht Co., **$175 million** against Turbomeca Engine Corporation and its French parent, **$60 million** against Suzuki, **$58 million** against Ford, **$57.8 million** against Affiliated FM Insurance Company, **$50 million** against Walmart, **$38 million** against Trustmark National Bank, **$25 million** against Prudential Insurance Company, **$25 million** against Dallas Nephrology Associates, **$25 million** against California Federal Bank and one of its subsidiaries, **$22.5 million** against Ford, **$21.42 million** against VF Corp, **$20 million** against General Motors, **$20 million** against State Compensation Insurance Fund; **$15 million** against Foremost Insurance Company, **$14.3 million** against Dupont, **$12 million** against Rheem Manufacturing Company, **$12 million** against Gilbert Commonwealth of Michigan and its corporate grandparent, **$10.1 million** against Unocal, **$10 million** against Dow Chemical Company, **$10 million** against Daewoo America, **$10 million** against Fireman's Fund Insurance Company, **$10 million** against Subway Sandwich Shops, **$9 million** against Household Credit Services, Inc., **$8 million** against Southwestern Bell, **$8 million** against Foremost Insurance Company, **$7.5 million** against North American Life and Casualty Company, **$7.15 million** against American Film Technologies, Inc, **$6 million** against Coca-Cola, **$5.6 million** against General Motors, **$5 million** against Olsten Corporation, **$4.5 million**

against the Phi Sigma Kappa fraternity, **$4 million** against Ryder Commercial Leasing, **$4 million** against East Penn Corporation, **$3.9 million** against United Services Automobile Association, and **$3.5 million** against Baxter Healthcare Corporation.[2]

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[2] *See Jury Awards $500 Million to Funeral Home Owner*, NAT'L L.J., Dec. 11, 1995, at A17; *$500 Million Awarded in Death of 9-Year-Old*, WASHINGTON POST, Sept. 30, 1995, at A2; Jackman, *$350M Jury Verdict in Crash*, NAT'L L.J., Aug. 7, 1995, at A6; Rankin, *Suzuki Decides to Fight, Loses*, NAT'L L.J., July 24, 1995, at A6; Kueterman, *Ford Loses Big in Bronco II Rollover Case*, NAT'L L.J., Nov. 13, 1995, at A11; *Samoan Gov't Wins $86.7M in Insurance Bad-Faith Suit*, NAT'L L.J., Oct. 23, 1995, at A17; *Wal-Mart Ex-Worker Awarded $50 Million in Sex-Harrassment Suit*, WALL ST. J., June 30, 1995, at B12; Epstein, *$38.5M Award Against Bank in Car Loan Case*, AM. BANKER, Jan. 30, 1995, at 1; *Jury Awards Retiree $25M in Fraud Case*, NAT'L L.J., Sept. 25, 1995, at A13; Boardman, *Big Suits: Bio-Medical Applications Management Co. Inc. et al. v. Dallas Nephrology Associates*, TEXAS LAW., Feb. 27, 1995, at 16; *Calif. Jury Finds Fraud in Handling of Bank Loans*, NAT'L L.J., July 31, 1995, at A9; Geyelin, *Jury Orders Ford to Pay $25 Million for Death Linked to Bronco II Rollover*, WALL ST. J., June 23, 1995, at B2; *Company to Get $22.14M in Suit over $350 Tax Bill*, NAT'L L.J., Aug. 7, 1995, at A13; *Macon Jury Tells GM to Pay Ex-Auto Dealer $26 Million*, BIRMINGHAM NEWS, June 9, 1995, at 1; *Insurer Must Pay $20.33M in Bad-Faith Action*, NAT'L L.J., Sept. 18, 1995, at A13; *Foremost Corp. Hit with $15M Jury Verdict in Ala. Suit*, DOW JONES INT'L NEWS SERV. 11:43:00, June 13, 1995; Miller, *DuPont Told to Pay About $23.9 Million in Benlate Case*, WALL ST. J., Jan. 27, 1995, at B5; *Maker of Water Heater Told to Pay $15 Million*, NAT'L L.J., Oct. 16, 1995, at A11; *$12M in Punitives Awarded in Retrial of Contract Case*, NAT'L L.J., Aug. 7, 1995, at A13; *Bad Faith Spelled Big Bucks*, SACRAMENTO BEE, May 14, 1995, at E1; Burton, *Dow Chemical Is Ordered to Pay Punitive Damages in Implant Trial*, WALL ST. J., Oct. 31, 1995, at B11; Granelli, *Daewoo Must Pay O.C. Piano Dealer $10 Million More*, L.A. TIMES, Oct. 21, 1995, at 1; Louis, *Dentist Gets $10 Million Settlement*, S.F. CHRON., Feb. 2, 1995, at D1; Gruber, *$10 Million Award a Lot to Swallow for Subway Shops*, CHI. TRIB., Nov. 29, 1995, at Bus. 3; *Debt Collection Outrages Carry $11 Million Penalty*, NAT'L L. J., Oct. 2, 1995, at A11; Bryant, *Movers Win $12 Million Jury Award*, ST. LOUIS POST-DISPATCH, May 5, 1995, at 1A; Couch, *Iowa Firm Wins Case Against Insurer*, DES MOINES REG., Nov. 17, 1995, at 10; *Insurers to Appeal $8.3 Million Award to Woman Denied Full Payment*, BNA HEALTH CARE DAILY, June 7, 1995; *Jury Says Film Company Defrauded*

Although trial courts ordered remittiturs in several of these cases, the amounts left standing generally remained enormous. For example, the $60 million punishment against Suzuki was reduced to **$20 million**, while the $50 million punishment against Wal-Mart and the $38 million punishment against Trustmark each were reduced to **$5 million** and the $22.5 million punishment against Ford was reduced to **$4 million**.[3] Moreover, trial courts have refused to disturb even a penny of the **$400 million** punishment against the Loewen Group, the **$21.4 million** punishment against VF Corp., the **$12 million** punishment against Gilbert Commonwealth, and the **$7.5 million** punishment against North American Life and Casualty.[4]

Former CEO, NAT'L L.J., July 10, 1995, at A11; Frank & Markels, *Coca-Cola Loses ADA Case for Firing Alcoholic in Treatment*, WALL ST. J., July 3, 1995, at B5; *Alaska Jury Finds Defect in Jimmy Belt*, AUTOMOTIVE NEWS, Nov. 13, 1995, at 52; *Ex-Olsten Executive is Awarded Damages in Discrimination Suit*, WALL ST. J., Nov. 10, 1995, at B8; Riley, *Paralyzed Woman Awarded $8 Million: Jury Decision Holds Fraternity Liable*, ST. LOUIS POST-DISPATCH, Nov. 3, 1995, at 1A; *Ryder Must Pay Millions*, K.C. STAR, Nov. 15, 1995, at B1; Sanford, *Battery Company Awarded $4,087,000*, BIRMINGHAM NEWS, July 10, 1995, at 7B; Burdman, *Jury Says Insurer Acted in Bad Faith*, S.F. CHRON., June 10, 1995, at A19; *$6 Million Award in Implant Case*, N.Y. TIMES, Feb. 5, 1995, at 18, col.4.

[3] *See Suzuki Appealing Accident Ruling*, ST. LOUIS POST-DISPATCH, Nov. 15, 1995, at 3B; Jackman, *Wal-Mart Verdict Cut to $5 Million*, K.C. STAR, Nov. 21, 1995, at B2; O'Hara, *Judge Slashes Damages Against Trustmark in Case Involving Force-Placed Insurance*, AM. BANKER, Aug. 9, 1995, at 8; *Judge Cuts Ford's Damages on 1992 Rollover Accident*, AUSTIN AMERICAN-STATESMAN, Aug. 26, 1995, at D5.

[4] *See Loewen Reviews Options for Obtaining Big Bond*, WALL ST. J., Nov. 21, 1995, at A4; *VF's Wings Clipped*, WOMEN'S WEAR DAILY, Sept. 21, 1995, at 11. The Chamber has not located news accounts of the trial courts' rulings regarding Gilbert Commonwealth and North American Life and Casualty. The Chamber's information regarding these cases is based upon representations of counsel for Union Security who represent both Gilbert Commonwealth and North American Life and Casualty in

As this survey reflects, the punitive damages crisis is very much real and enduring. The issue of excessive punitive damages thus remains an exceedingly important one that this Court should address either in *BMW* or in one of the cases that is pending at the time it decides *BMW*. As we next discuss, the present case is an ideal one in which to reach the issue if the Court does not do so in *BMW*.

B. Union Security's Petition Is An Ideal Vehicle For Addressing The Issue Of Excessive Punitive Damages.

In the event that the Court does not reach the excessiveness issue in *BMW*, Union Security's petition presents an ideal opportunity to do so. Unlike many of the petitions that the Court is holding for *BMW*,[5] Union Security's presents only an excessiveness issue. Accordingly, if the Court grants Union Security's petition, there is no possibility that some threshold issue would prevent it from reaching the excessiveness question.

Moreover, unlike some of the petitions that are now pending,[6] there is no real dispute in this case about the nature of the defendant's conduct. The parties and lower courts all are in agreement that Union Security was held liable for having its product sold by a banker who, on a single, isolated occasion, failed to disclose to a debtor that inaccuracies on a

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their state-court appeals.

[5] *See, e.g., Fraidin v. Weitzman*, No. 94-1230; *Liberty Mut. Ins. Co. v. Chemstar, Inc.*, No. 94-1337; *Owens-Corning Fiberglas Corp. v. Pickering*, No. 94-1476; *Honda Motor Co. v. Oberg*, No. 94-1890; *Independent Life & Accident Ins. Co. v. Harrington*, No. 94-2016.

[6] *See, e.g., Fraidin, supra*; *OXY USA Inc. v. Continental Trend Resources, Inc.*, No. 94-1838; *Wolfberg v. Greenberg*, No. 95-433.

health statement could result in the rescission of coverage.[7] The Court thus would be free of the kind of factual wrangling that has characterized some of its other punitive damages cases and instead would have a "clean shot" at the question whether the punishment is disproportionate to the gravity of the misconduct.

The Court is unlikely to find a better case than this one for reining in excessive punitive damages. As the petition demonstrates, the $2 million punishment here bears no reasonable relationship to the three central factors in the

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[7] *See, e.g.*, Opposition to a Stay of Execution of Judgment Pending the Filing of a Petition for Writ of Certiorari at 16, *Union Security Life Ins. Co. v. Crocker*, No. A-299 (filed Oct. 3, 1995) ("Petitioner is responsible, through respondeat superior, for the fraud of its agent Taylor."); Pet. App. 6a ("[T]he jury could reasonably find that *Taylor* had a duty to disclose to the Crockers that the policy benefits might not be paid if Mr. Crocker in fact had had health problems and that his failure to do so induced them to obtain the credit life coverage, for which premiums were paid until coverage was denied at Mr. Crocker's death.") (emphasis added); *id.* at 19a ("This case involved misrepresentations made *by the agent* for defendants as well as concealment *by the agent* of material facts from the plaintiff and her deceased husband in the purchase of credit life insurance.") (emphasis added); *id.* at 20a ("There is no evidence either defendant engaged in similar misrepresentations or concealments/suppressions in their dealings with other credit life insureds. In other words, there is no evidence of repeated similar wrongs being committed by either of the defendants."); *id.* at 23a ("[T]his Court has found no repeated wrong-doing by either defendant. This was an isolated incident.").

To be sure, the Alabama Supreme Court characterized as wrongful Union Security's practice of deferring the investigation of the accuracy of health statements until after a suspicious claim is made. Pet App. 12a. However, there is no factual dispute about that practice. The only questions are whether that practice should be considered in setting the punishment and, if so, whether it justifies a punishment of the magnitude involved here. The Chamber is of the view that Union Security's practice should not be considered at all because (1) it was not the basis for the jury's verdict (*See* Pet. 15) and (2) the practice was permitted by Alabama law at the time Union Security discovered the misstatement in Mr. Crocker's health statement (*see* Pet. 15-16 & n.13).

excessiveness calculus — the harm to the plaintiff (actual and potential), the gain to the defendant, and the gravity of the misconduct.[8]

Petitioner has persuasively demonstrated that the punishment is thoroughly disproportionate to any measure of harm to the plaintiff or gain to the defendant. *See* Pet. 17-20.

As for the gravity of the misconduct, the Court need do little more than read the opinion of the Alabama Supreme Court to ascertain that Union Security was the *victim* of an attempted fraud, not the perpetrator. It is obvious from the opinion and from the undisputed testimony cited by the petitioner that either the agent (Taylor) or the Crockers or both acting in concert intended to "slip one by" Union Security.[9] The agent was aware that if the health statement indicated a pre-existing condition, Union Security would

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[8] The Chamber submits that consideration of a corporate defendant's financial condition is legitimate only as a mitigating factor. A defendant's substantial net worth is not a basis for upholding a punitive judgment that bears no relationship to the harm to the plaintiff, the gain to the defendant, and the gravity of the misconduct, particularly when, as here, the jury was not exposed to evidence of the defendant's financial circumstances. It bears emphasizing, moreover, that there is a broad — and to our knowledge unchallenged — consensus among economists that in cases involving corporate defendants a punishment need not and should not be larger merely because the defendant has substantial assets or other indicia of wealth. *See, e.g., Zazu Designs v. L'Oréal, S.A.*, 979 F.2d 499, 508-509 (7th Cir. 1992) (Easterbrook, J.); 2 AMERICAN LAW INSTITUTE, REPORTER'S STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 253-255 (1991); Abraham & Jeffries, *Punitive Damages and the Rule of Law: The Role of Defendant's Wealth*, 18 J. LEGAL STUD. 415 (1989); Chapman & Trebilcock, *Punitive Damages: Divergence in Search of a Rationale*, 40 ALA. L. REV. 741, 824-826 (1989); Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 ALA. L. REV. 1143, 1176-1177 (1989).

[9] The most likely scenario involves the Crockers' knowing participation. After all, if Taylor were acting on his own, he could have had no assurance that the Crockers would not read the health statement, correct the material misstatements, and thereby foil his scheme.

decline to issue coverage, that the bank (of which he was a branch manager) would not have its loan payments secured, and that he would not receive credit toward a bonus. At the same time, the Crockers' prior experience made them fully aware that, if Mr. Crocker disclosed his health condition, they either would not receive coverage at all or would be forced to pay substantially higher premiums. The record in this case reflects that Union Security never authorized Taylor or any other agent to submit materially inaccurate health statements. Indeed, as the trial court repeatedly observed, this was an "isolated incident." Pet. App. 20a, 23a. Moreover, given the short contestability period applicable to credit life policies, Union Security plainly had no incentive to encourage agents either to falsify health statements themselves or to look the other way when an applicant does so. Once the one-year contestability period elapses, Union Security cannot revoke coverage no matter how blatant the misrepresentation on the health statement and no matter how substantial the risk of loss on the policy.

In short, this case involves no "bad facts" that might come to light only after the Court grants certiorari. Unlike *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993), the record in this case is devoid of evidence of some sort of corporate scheme to defraud or oppress. *Compare id.* at 2715-16, 2717 n.12, 2722 (plurality opinion); *id.* at 2726 (Kennedy, J., concurring). Moreover, since the stay proceedings, respondent has been represented by experienced Supreme Court counsel who specializes in punitive damages litigation.[10] It is therefore exceedingly unlikely

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[10] Counsel of record for respondent has represented the respondents in *BMW*, *Honda*, and *TXO*. In addition, he has testified before Congress against punitive damages reform and has written articles in praise of punitive damages.

Petitioner's counsel also are highly experienced in the area of punitive damages. Indeed, petitioner's counsel of record argued three of the Court's five most recent punitive damages cases -- *BMW*, *Honda*, and

that, if certiorari is granted, respondent will unearth at the merits stage some new legal theory not mentioned in the opposition that would dramatically alter the Court's perception of the case. *Compare TXO*, 113 S. Ct. at 2734 (O'Connor, J., dissenting) ("Respondents' $5.0 to $8.3 million estimate [of potential harm] appeared for the first time after this Court granted certiorari, having been produced exclusively for our consumption.").

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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Browning-Ferris Indus. of Vermont, Inc. v. *Kelco Disposal, Inc.*, 492 U.S. 257 (1989).